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New York State Public Employment Relations
Board (PERB)

2-25-1992

State of New York Public Employment Relations Board Decisions from February 25, 1992

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from February 25, 1992

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NORMA LEMOINE,

Charging Party,

-and-

CASE NO. U-10410

LOCAL 1655, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.

ROBERT LIGANSKY, ESQ., for Charging Party

ROBERT PEREZ-WILSON, ESQ. (MARY J. O'CONNELL
of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Norma Lemoine to a decision by an Administrative Law Judge (ALJ). After hearing, the ALJ dismissed Lemoine's charge, which alleges that Local 1655, District Council 37, AFSCME, AFL-CIO (Local) violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it refused to proceed to arbitration on six grievances which Lemoine had filed against her employer. The ALJ concluded that Lemoine had not established that the Local's decision to not arbitrate her grievances was arbitrary, discriminatory or made in bad faith.

The arguments made in support of Lemoine's exceptions are essentially the same as the ones she made to the ALJ and, as did the ALJ, we find them without merit.

Lemoine alleges that the Local breached its duty of fair representation because she was not permitted to consult either with the Local's executive board, which made the decision not to proceed to arbitration, or the Local's attorney, who reviewed the grievances and opined to the executive board that the grievances were all without merit or otherwise unworthy of proceeding to arbitration.

No matter how important an individual may consider his or her grievances, there is no statutory right to require the union to accept and process to arbitration any particular employee grievance nor is there any statutory right to determine the means by which the union investigates and evaluates a grievance. No per se theory of violation can be premised upon a union's failure or refusal to consult with the employee in a particular fashion before making decisions about the prosecution of those grievances. To hold otherwise would unreasonably and unnecessarily interfere with the union's internal affairs and would deny the union the wide range of reasonableness to which it is entitled in determining whether and how it will process grievances.^{1/}

Lemoine also again alleges that the Local breached its duty of fair representation because Judy Lawrence, Lemoine's immediate supervisor, and one of the members of the executive board who

^{1/}See, e.g., City Employees Union Local 237, 20 PERB ¶3042 (1987).

participated in the deliberations on her grievances, was the person against whom several of Lemoine's grievances were directed. We again reject any theory of per se violation with respect to Lawrence's participation in the executive board's deliberations for the same reasons we rejected a per se theory with respect to Lemoine's consultation allegations. On the facts of this case, there is no evidence that Lawrence was biased against Lemoine, had prejudged the merits of any of her grievances or had adversely influenced the executive board's vote. Indeed, as the ALJ noted, Lawrence was one of the two executive board members who voted in favor of arbitrating Lemoine's grievances.

Lemoine also notes in her exceptions that the Local had originally voted to take her grievances to arbitration. It is unclear to us whether this is intended to be a separate basis for exception or whether Lemoine mentions this only in the context of her exceptions which are directed to the Local's failure to consult with her. To the extent Lemoine intends the former, we deny the exception. The record in this respect shows that the executive board had not actually voted to accept Lemoine's grievances for arbitration at its May 11 meeting. Although the consensus of the executive board at that time may have favored arbitration, the members of the executive board deferred to a request made by the Local's president that they first read her grievances and permitted him an opportunity to again consult with

the Local's attorney before they actually voted. A union's duty of fair representation does not prohibit it from reconsidering a decision in circumstances in which it is persuaded in good faith that its initial decision warrants further review. As with the rest of Lemoine's exceptions, we find nothing persuasive in the record to evidence the Local's bad faith in the decision to not take her grievances to arbitration.

For the reasons set forth above, Lemoine's exceptions are denied, the ALJ's decision is affirmed and the charge is dismissed in its entirety.

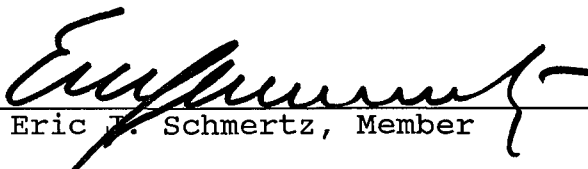
DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DEPEW POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

- and -

Case No. U-11098

VILLAGE OF DEPEW,

Respondent.

WYSSLING, SCHWAN & MONTGOMERY (W. JAMES SCHWAN of
counsel), for Charging Party

MAHONEY, BERG & SARGENT (NICHOLAS J. SARGENT of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Depew (Village) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the Village by the Depew Police Benevolent Association, Inc. (PBA). The ALJ held that the Village violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it prohibited officers and members of the PBA from conducting a particular fund raiser and threatened them with suspension from their jobs if the fund raiser were held.

Several of the Village's exceptions concern the extent to which the Chief of Police, John T. Maccarone, had either granted

or withheld permission for PBA events in the past pursuant to two departmental rules.^{1/}

In another part of its exceptions, the Village challenges the ALJ's finding that Maccarone did not act out of an interest to uphold the police department's integrity, but out of a personal interest to avoid looking "bad" to the unit employees because he had disciplined the employee on whose behalf the fund raiser was to be held.

The Village argues in its last exceptions that the PBA fund raiser was not protected activity and, therefore, the Village was free to prohibit the event and to threaten the employees with suspension were one to be held.

For the reasons which follow, we affirm the ALJ's finding that the Village violated §209-a.1(a) of the Act.

^{1/}Article XI, Rule 78 of the police department's Rules of Conduct prohibits:

Seeking or soliciting contributions of any kind from anyone, by any means, for any purpose, under any circumstances, including collections for charitable purposes by any member, group of members or their agent, except as specifically authorized by the Chief of Police.

Article XI, Rule 81 prohibits:

Giving any gift, present or gratuity to another Department member, or a member of his family without the specific approval of the Chief of Police, excluding donation not to exceed five dollars given in honor of retirement or to hospitalized or deceased members, provided approval of the Chief of Police is obtained for the donations. Party, dinner and entertainment fees will be paid for individually by persons attending without prior collection through Department channels.

This case presents issues about an employer's right to regulate through the employment relationship the conduct of its employees as union members. It is beyond any dispute that employees have the protected right to participate freely in the legitimate affairs of their chosen bargaining agent without suffering job-related consequences for such participation. The right is not so absolute, however, as to permit for no examination of the nature of the union activity, the manner in which it is carried out or the employer's legitimate interests in regulating the activity. As with many of the issues which arise under the Act, we believe that the correct approach to the disposition of this question necessitates a balance of employee, union and employer rights and interests, subject, of course, to the provisions of the Act.

An example drawn in part from this case is illustrative. The Village would violate the Act if it were to invoke its departmental rules to prohibit the PBA from soliciting its own membership for money to offset costs it or a member incurred in collective negotiations, contract administration or grievance adjustment. These form the core of a bargaining agent's statutory responsibilities and their availability is one of the fundamental reasons employees choose to be represented by a union. An employer has no legitimate interest in the regulation of such conduct, and any interference with such activity, whether or not pursuant to departmental rule, would be a per se violation of §209-a.1(a) of the Act. At the other extreme, we can identify

legitimate employer interests which might permit the Village to regulate a police officer's personal solicitation of Village residents to support PBA-sponsored causes or activities which are unrelated to the PBA duties as the bargaining agent.

We have no need in this case to attempt to define the outer limits of an employer's permissible regulation of union activity because the fund raiser proposed by the PBA is that type of activity which an employer may not prohibit. The PBA's fund raiser was instituted at the request of a unit employee, William Gummo, who had been brought up on disciplinary charges by Maccarone. Its purpose was to raise money to assist Gummo with the expenses he had incurred in the defense of those disciplinary charges. Therefore, the fund raiser directly involved Gummo's statutory right to be represented by the PBA on the grievance and the PBA's corresponding right to represent him. As proposed to Maccarone, the fund raiser was to be held off premises, by officers out of uniform, open to anyone who purchased a ticket, and without solicitation of individuals for donations. We cannot identify in this type of union activity, nor has the Village pointed to, any legitimate employer interests which would even arguably permit the Village to either prohibit it or threaten employees with suspension if they were to hold it.

Maccarone's prior conduct pursuant to the departmental rules and his motivation for refusing to permit the fund raiser are immaterial to this analysis. To the extent that the departmental rules conflict with rights under the Act, the rules are invalid

as applied to this fund raiser. Consequently, they do not afford the Village any source of right in defense of Maccarone's conduct. Even if Maccarone's motivation were as he described, and not as the ALJ found, the prohibition of the fund raiser would still be improper under the Act. The fund raiser as proposed simply would not have compromised any of the department's legitimate interests.

As to the Village's argument that the courts have recognized the validity of certain no-solicitation rules, we simply note, as did the ALJ, that the circumstances in the cases cited by the Village^{2/} were materially different from those here and that the decisions did not address the statutory questions presented to us. As such, we do not consider the courts' decisions to be dispositive.

For the reasons set forth above, the ALJ's decision is affirmed and the Village's exceptions are denied.

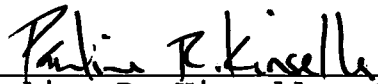
IT IS, THEREFORE, ORDERED that the Village:

1. Cease and desist from preventing the PBA fund raiser as proposed on behalf of William Gummo;
2. Cease and desist from threatening PBA officers or unit employees with suspension if such a fund raiser were to be held;

^{2/}McGuire v. Krane, 48 N.Y.2d 661 (1979); Petri v. Milhim, 136 A.D.2d 641 (2d Dep't 1988); Marano v. Incorporated Village of Lake Success, 86 Misc.2d 936 (Sup. Ct. Nassau Co. 1976).

3. Sign and post the attached notice at all locations ordinarily used to post informational notices to unit employees.

DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees of the Village of Depew (Village) in the unit represented by the Depew Police Benevolent Association, Inc. (PBA), that the Village:

1. Will not prevent the PBA fund raiser as proposed on behalf of William Gummo; and
2. Will not threaten PBA officers or unit employees with suspension if such a fund raiser were to be held.

.....VILLAGE OF DEPEW.....

Dated

By
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, ORLEANS COUNTY
LOCAL 837, ORLEANS COUNTY EMPLOYEE UNIT,

Charging Party,

-and-

CASE NO. U-11827

COUNTY OF ORLEANS,

Respondent.

NANCY E. HOFFMAN, ESQ. (WILLIAM A. HERBERT of counsel),
for Charging Party

HARTER, SECREST & EMERY (ERIC A. EVANS of counsel),
for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the County of Orleans (County) to a decision of an Administrative Law Judge (ALJ) that the County violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when, as charged by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Orleans County Local 837, Orleans County Employee Unit (CSEA), it terminated the employment of Richard Townsend. The County argues that there is insufficient record evidence that Townsend's termination was caused by his exercise of rights protected by the Act, and that by finding to the contrary, the ALJ incorrectly shifted to the County the burden to prove a legitimate business reason or disprove pretext.

CSEA, in cross-exceptions, objects to the ALJ's remedial order as too limited. It seeks an order requiring the County to cease and desist from discriminating against other employees who engage in any protected activity, to give individual notice to unit employees of the violation found and to give County supervisors written notice of the unit employees' rights under the Act.

In its response to the County's exceptions, CSEA argues that the ALJ correctly held that it had established a prima facie violation of the Act which was not successfully rebutted. The County argues, in response to CSEA's exceptions, that the ALJ's remedial order is correct, assuming her finding of violation is affirmed.

The parties do not take exception to the ALJ's findings of fact in any material respect. We adopt and incorporate those findings and provide only a brief background description of the circumstances which led to the charge being filed.

On March 29, 1990, Townsend met with CSEA's labor relations specialist and the local CSEA president to discuss a possible grievance. Pease was aware of their meeting and watched as they entered the room.

On April 2, 1990, CSEA filed a grievance objecting to a suspension the County imposed on Townsend stemming from an incident which involved an alleged theft of money. On March 21, 1990, Townsend and two other County employees found a check and

cash in a suitcase that presumably belonged to a County Commissioner. One of the other employees took the cash and stated he "would take care of it later." Townsend took the check and soon after handed it to his immediate supervisor. Later, the employee who had taken the cash gave Townsend some of it.

Townsend then went to the office of Jack Pease, Administrator of the Orleans County Nursing Home where the incident had occurred, gave him his share of the cash, and explained what had happened. The other two employees turned in their share of the money when confronted by their supervisors.

Later that day, Pease met with other County officials to discuss the incident, and it was decided that all three employees, including Townsend, would be suspended for fifteen days for their parts in the incident. Pease did not then think that Townsend, although a provisional employee, should be terminated.

The following day, Townsend appeared at a meeting with Pease, other County officials and Ann Harrold, CSEA's vice-president, and was given by Pease a written statement regarding the incident and the County's proposed discipline. Harrold and Townsend discussed the matter and thereafter informed County officials that they disagreed with its version of the incident.

On April 6, 1990, Townsend was terminated at Pease's direction.

DISCUSSION

It is well settled that to prove a case of improper interference or discrimination against an individual under the Act, a charging party must show that the affected individual was engaged in protected activity, that such activity was known to the person or persons making the adverse employment decision, and that the action would not have been taken "but for" the protected activity.^{1/} In its exceptions, the County argues only that CSEA failed from the facts as found by the ALJ to prove a prima facie violation because the necessary "but for" causation is not established.

We disagree with the County on this issue both as a matter of fact and law. The County is incorrect in its factual assertion that the ALJ relied exclusively upon evidence of pretext in concluding that it had violated the Act. In finding that CSEA established a prima facie violation, the ALJ relied upon, inter alia, the timing of the County's decision, Townsend's work record, the County's change in its first announced disciplinary action, statements by the County's agents about what it had not considered in deciding to discharge him, and statements about the consequences for Townsend's refusal to accept a suspension. It is our conclusion that these facts were sufficient to establish, prima facie, the requisite "but for"

^{1/}See, e.g., City of Salamanca, 18 PERB ¶3012 (1985).

causation, thus shifting to the County the burden to explain its actions.

We also disagree with the County's legal proposition that we may not consider evidence of pretext as part of a charging party's case on causation. We are unaware of any decision in which we have so held and the County does not cite us to any. The pretextual nature of an employer's reasons for an employment action may be a proper part of a charging party's case simply because proof of pretext may support the allegation that the action was taken because of the employee's exercise of protected right. The ALJ in a given case may not ultimately adopt an inference of impropriety from this, but that does not mean that pretext evidence can only rebut an employer's defense of "legitimate business reason." Such a holding would deny a charging party an opportunity to introduce relevant evidence or to have it considered except in those cases in which a respondent put forth a defense of business justification.^{2/}

It is our finding that the ALJ's conclusion that Townsend was terminated because he engaged in protected activity is supported by the record, and that the ALJ's decision should be affirmed in this respect.

^{2/}The ALJ has discretion to control the order of proof to promote an orderly and expeditious hearing. We hold only that evidence of pretext in support of a prima facie violation is admissible regardless of the respondent's defenses.

In its cross-exceptions, CSEA asserts that the ALJ's order should be modified to require the County to cease and desist from interfering with or discriminating against all of its employees. The ALJ ordered in this respect only that the County cease and desist from terminating Richard Townsend because he filed a grievance on April 2, 1990.

We recognize that we have often ordered an employer to cease and desist from discriminatory practices generally upon a finding that the employer has in some way interfered with or discriminated against an employee because that employee exercised protected rights. CSEA's exception gives us the opportunity to examine this practice.

Section 213 of the Act provides a procedure for the judicial review and enforcement of PERB's final orders. This enforcement mechanism and the respondent's right to be held accountable only for those violations charged necessitate that our orders be limited to the facts reflected in the record, be stated with as much specificity as is reasonably possible, and be tailored to meet the particular circumstances of the proceeding. A broad cease and desist order raises difficulties in subsequent enforcement proceedings involving facts unlike and unrelated to those originally charged. In an enforcement proceeding brought under a broad cease and desist order, the court could assume the role of finder of fact, becoming a labor tribunal of first instance, forced to make the very factual determinations which

§205.5(d) of the Act expressly vests in PERB. As this case concerns only the discriminatory discharge of Townsend, the ALJ properly issued a narrow order prohibiting the County from discharging Townsend because he filed a grievance. Townsend's reinstatement with back pay fully remedies the action actually taken by the County and the narrow cease and desist order still permits reasonable notice to unit employees of the nature of the violation found against the County and of their statutory rights and the County's duties in relevant respects. We conclude that a cease and desist order which is not directed to the specific conduct found to violate the Act is generally not necessary and should be avoided in the interest of minimizing problems in enforcement and contempt proceedings brought on subsequent developments unrelated to the matter which gave rise to the original charge. Accordingly, we dismiss CSEA's exception which is directed to the scope of the ALJ's cease and desist order.

We also reject CSEA's request for an order requiring the County to give either individual notice to unit employees or to notify its supervisory employees in writing as to their obligations under the Act. Our policy is to require, in most cases, the prominent posting of a notice of violation to ensure that affected persons have knowledge of their rights and obligations under the Act.^{3/} There being no evidence in this case to indicate that a posting is inadequate, we will not

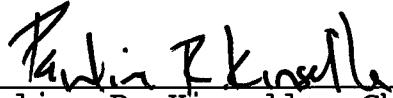
^{3/}See City Univ. of New York, 23 PERB ¶3011 (1990).

deviate from this policy by requiring extraordinary means of communication of rights and duties.

IT IS, THEREFORE, ORDERED that the County:

1. Forthwith offer Richard Townsend reinstatement to his former position;
2. Make Townsend whole for any loss of pay and benefits suffered by reason of his termination from the date thereof to the effective date of the offer of reinstatement less any earnings derived from employment in the interim, with interest at the maximum current legal rate;
3. Cease and desist from terminating Richard Townsend from employment because he filed a grievance on April 2, 1990;
4. Sign and post a notice in the form attached at all locations ordinarily used to post informational notices to unit employees.

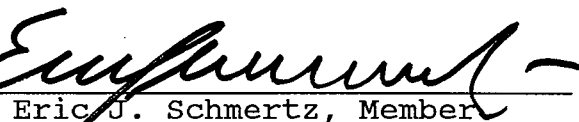
DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by CSEA, Inc., Local 1000, AFSCME, AFL-CIO, Orleans County Local 837, Orleans County Employee Unit, that the County of Orleans will:

1. Forthwith offer Richard Townsend reinstatement to his former position;
2. Make Townsend whole for any loss of pay and benefits suffered by reason of his termination from the date thereof to the effective date of the offer of reinstatement less any earnings derived from employment in the interim, with interest at the maximum current legal rate; and
3. Not terminate Richard Townsend from employment because he filed a grievance on April 2, 1990.

COUNTY OF ORLEANS

Dated.....

By.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GLENS FALLS POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12196

CITY OF GLENS FALLS,

Respondent.

GRASSO AND GRASSO, ESQS. (JANE K. FININ of counsel),
for Charging Party

McPHILLIPS, FITZGERALD & MEYER, ESQS. (JAMES E. CULLUM
of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Glens Falls (City) to a decision by the Director of Public Employment Practices and Representation (Director). On a charge filed by the Glens Falls Police Benevolent Association (PBA), the Director held that the City had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally eliminated its practice of giving unit employees a credit for retirement purposes for police service performed for other municipalities.

In finding a violation, the Director rejected the City's jurisdictional defense which rests on a theory that the charge

raises, at best, a contract violation which lies beyond our power to entertain pursuant to §205.5(d) of the Act.^{1/}

In its exceptions, the City renews its jurisdictional claim and it otherwise excepts to the Director's conclusion that a past practice regarding retirement credits for service for other municipalities ever existed or was discontinued. The PBA argues in its response that the Director's decision is correct and should be affirmed.

As we find that the charge is beyond our jurisdiction under §205.5(d) of the Act, the Director's decision must be reversed.

Although it was not clear from the charge as filed that there was a jurisdictional question raised by the PBA's allegations, that became apparent during the two days of hearing conducted by the Director. As the jurisdictional question raised by §205.5(d) of the Act relates to our power to entertain an improper practice charge, we are required to reach that issue whenever and however it comes to our attention and to dismiss any charge at any stage of the proceedings when we are persuaded that the charge lies beyond our jurisdiction.

^{1/}That section of the Act provides, in relevant part, that

the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

From the testimony of the PBA's own witnesses, and other evidence that it presented during the hearing, it is clear that the PBA alleges that the City agreed to give unit employees service credit for retirement purposes in the context of an agreement to a 20-year retirement plan option that was incorporated into the parties' 1989-91 contract that was in effect when the charge was filed. Assuming there had been a practice regarding service credits, it became, from the PBA's perspective, a matter of contract right when the 1989-91 contract was settled. In this respect, we do not agree with the Director's conclusion that the parties' discussions during negotiations were merely proof of the City's practice. We read the record to establish an allegation by PBA that during those negotiations it reached an agreement with the City that employees would be eligible for the 20-year plan because those who needed credit for service in other municipalities to reach the requisite years of service would receive those credits. Based upon that allegation, from that point forward the source of the City's obligation was no longer based on a practice but on a contract.

As we are without power under §205.5(d) of the Act to entertain or to remedy alleged contract violations, the charge must be dismissed. Having decided to dismiss for lack of jurisdiction, we do not consider any of the City's other exceptions.

IT IS, THEREFORE, ORDERED that the charge must be, and
hereby is, dismissed.

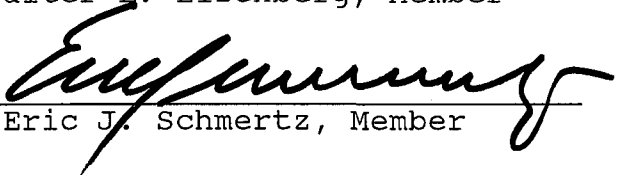
DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
ROBERT REESE, JR.,

Charging Party,

- and -

CASE NO. U-12324

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.

Respondent.

In the Matter of
ROBERT REESE, JR.,

Charging Party,

- and -

CASE NO. U-12325

STATE OF NEW YORK (ROCKLAND PSYCHIATRIC
CENTER),

Respondent.

ROBERT REESE, pro se

NANCY E. HOFFMAN, ESQ. (MARILYN S. DYMOND of counsel)
for Respondent in U-12324

WALTER J. PELLEGRINI, ESQ., for Respondent in U-12325

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Robert Reese, Jr., to two decisions issued by the Director of Public Employment Practices and Representation (Director). Reese's first charge, filed against the Civil Service Employees Association, Inc. (CSEA), alleges that CSEA violated §209-a.2(a) and (c) of the

Public Employees' Fair Employment Act (Act) when it inadequately investigated his layoff by his employer, the State of New York (Rockland Psychiatric Center) (State) and condoned allegedly racist supervisory actions in conjunction with the layoff. The Director dismissed the charge against CSEA as deficient because, as filed and later amended, it did not set forth any facts which would establish that CSEA had breached its duty of fair representation. The Director held that Reese's allegations against CSEA were entirely conclusory and in many respects untimely. Moreover, he held that Reese's burden to plead facts in support of his allegations was not satisfied simply by the submission of "myriad" documents.

The Director also dismissed Reese's second charge which he filed against the State. This charge alleges, as amended, that the State laid him off from work "in a racist way" and because he was "trying to be involved with the union" The Director dismissed the charge against the State on the ground that we have no jurisdiction over an employer's allegedly racially motivated actions and because there were no facts alleged which would evidence that the State's conduct was taken for reasons prohibited by the Act.

In his exceptions, Reese again alleges that his layoff was racially motivated and he points to certain statements from a CSEA officer as reported in a local newspaper as proof of that allegation. As the Director correctly stated, however, we do not have jurisdiction over allegations that an employer has

discriminated against individuals because of their race. At the State level, such allegations are within the jurisdiction of the State Division of Human Rights. Therefore, we may not consider whether Reese's allegations of racial discrimination were adequately supported by the materials he filed with the Director. Even if his allegations in this respect were true, we still would not be able to find any violation of the Act against the State on that basis.

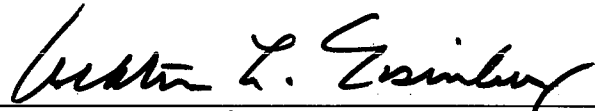
Reese also alleges that the Director failed to investigate his allegations of racial discrimination and similarly failed to investigate certain individuals within the State and CSEA who allegedly had information relevant to his claim that his layoff was racially motivated. This exception is denied for two reasons. First, as noted, the racial discrimination allegation is not within our jurisdiction. Second, to whatever extent Reese's allegations could be read to state an improper employer or union practice within our jurisdiction, it was his duty to properly plead and support his allegations. As the agency which adjudicates allegations of statutory impropriety, PERB does not have any investigatory role. The Director, therefore, had no right or duty to investigate Reese's allegations or otherwise to present the charges for him.

Our review of the Director's decisions is limited to the records as they were developed before him.^{1/} Those records do not show that Reese was denied a fair chance to state or prove a statutory cause of action which we could entertain. To the contrary, Reese was given extensions of time and other opportunities to respond to and correct the noted deficiencies in his charges. Having failed to correct the stated deficiencies, the Director correctly dismissed the charges.

For the reasons set forth above, the exceptions are denied and the Director's decisions are affirmed.

IT IS, THEREFORE, ORDERED that the charges must be, and hereby are, dismissed.^{2/}

DATED: February 25, 1992
Albany, New York



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{1/}Reese's submission to us of other information has not been considered because it was not before the Director, was not newly discovered and because certain of the information was submitted in letters Reese filed with us after he and the other parties were notified that the exceptions were complete.

^{2/}Chairperson Kinsella did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ONONDAGA-CORTLAND-MADISON BOARD OF
COOPERATIVE EDUCATIONAL SERVICES,

Charging Party,

-and-

CASE NO. U-12540

ONONDAGA-CORTLAND-MADISON BOCES
FEDERATION OF TEACHERS, NYSUT,
AFT #2897,

Respondent.

REBECCA STREIB, for Charging Party

HELEN BEALE, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Onondaga-Cortland-Madison Board of Cooperative Educational Services (BOCES) to the dismissal by the Director of Public Employment Practices and Representation (Director) of the charge it filed against the Madison BOCES Federation of Teachers, NYSUT, AFT #2897 (Federation). BOCES' charge alleges that the Federation violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it refused to abide by or sought to add a condition to an agreement which was allegedly reached between

the parties in settlement of an earlier improper practice charge which the Federation had filed against BOCES.^{1/}

Relying upon our decision in Local 1170 of the Communications Workers of America^{2/} (hereinafter CWA), the Director held that the processes which lead to the settlement of an improper practice charge do not constitute the type of negotiations to which any statutory duty to negotiate in good faith pertains.

CWA involved a party's refusal to execute a disciplinary grievance settlement. We there held that the duty to negotiate in good faith, as defined in §204.3 of the Act and as enforced through the Act's refusal to bargain provisions, was intended to apply only to those discussions which arise in the context of negotiations for a collective bargaining agreement. The rationale which led us to this conclusion in CWA is equally applicable to this case. We cannot discern any material distinction favorable to the BOCES between grievance settlement discussions and improper practice settlement discussions for the purpose of establishing a cause of action under §209-a.2(b) of

^{1/}The Federation has sought to continue the processing of that charge because the BOCES would not agree that the parties' settlement was enforceable under the grievance procedures of their collective bargaining agreement.

^{2/}23 PERB ¶3004 (1990).


the Act. The Director correctly dismissed the instant charge as legally deficient.^{3/}

For the reasons set forth above, the Director's decision is affirmed, BOCES' exceptions are denied and the charge is hereby dismissed in its entirety.

DATED: February 25, 1992
Albany, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

^{3/}By this holding, we do not suggest that there is no remedy for a wrongful breach of an improper practice charge settlement. The remedies may include applications to this Board for reestablishment of the original improper practice charge and/or for enforcement of the improper practice charge settlement agreement or such judicial action as the Court may deem appropriate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the

EASTPORT SCHOOL UNIT, SUFFOLK
EDUCATIONAL LOCAL 870, CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC., LOCAL 1000,
AFSCME, AFL-CIO, and SUFFOLK EDUCATIONAL
LOCAL 870, CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., LOCAL 1000, AFSCME,
AFL-CIO, and CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., LOCAL 1000, AFSCME,
AFL-CIO,

Case No. D-0249

Respondents,

upon the Charge of Violation of
§210.1 of the Civil Service Law.

BOARD DECISION AND ORDER

On September 14, 1990, Alan D. Oshrin, Chief Legal Officer for the Eastport Union Free School District filed a charge alleging that the Eastport School Unit, Suffolk Educational Local 870, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and Suffolk Educational Local 870, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, had violated Section 210.1 of the Civil Service Law (CSL) in that the Respondents caused, instigated, encouraged or condoned a strike against the Eastport Union Free School District on August 15, 1990.

The Respondents requested PERB's Counsel to recommend to this Board that Respondents' dues and agency shop fee deduction privileges be suspended for a period of two months.^{1/} The

^{1/} The penalty is based upon the conduct of the Eastport School Unit, Suffolk Educational Local 870, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO.

charging party has no objection to this proposed penalty.

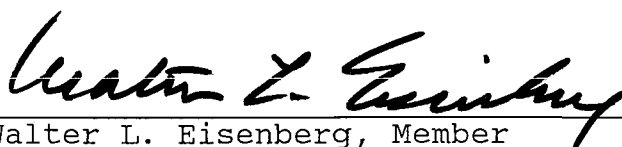
Upon the understanding that Counsel would recommend, and this Board would accept that penalty, the Respondents withdrew their answer to the charge. Counsel has so recommended. We determine that the recommended penalty is a reasonable one and is consistent with the policies of the Act.

WE ORDER that the dues and agency shop fee deduction rights of the Eastport School Unit, Suffolk Educational Local 870, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and Suffolk Educational Local 870, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, be suspended, commencing at the first practicable date, and continuing for a period of two months. Thereafter, no dues or agency shop fees shall be deducted on their behalf by the Eastport Union Free School District until the Respondents affirm that they no longer assert the right to strike against any government as required by the provisions of CSL §210.3(g).

DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

-and-

CASE NO. C-3816

TOWN OF ROSENDALE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Federation of Police Officers, Inc. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All employed in the title of Dispatcher,
Police Officer, Investigator and Sergeant.

Excluded: The Chief of Police and all other employees of
the employer.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, Inc. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 182, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner,

-and-

CASE NO. C-3879

TOWN OF WEST TURIN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Local 182, International Brotherhood of Teamsters has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All laborers employed in the Highway
Department.

Excluded: Clerical employees, Superintendent of Highways
and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 182, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1992
Albany, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SERVICE EMPLOYEES INTERNATIONAL UNION
AFL-CIO, LOCAL 200-C,

Petitioner,

-and-

CASE NO. C-3890

TOWN OF RIDGEWAY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

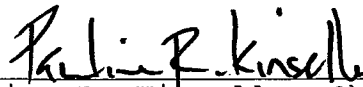
IT IS HEREBY CERTIFIED that the Service Employees International Union, AFL-CIO, Local 200-C has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Motor Equipment Operators

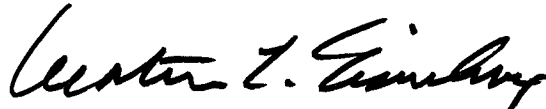
Excluded: Management and Office Employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Service Employees International Union, AFL-CIO, Local 200-C. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member